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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 600.

HARRY E. HALLENBECK, Receiver of SOUTH ASHLAND NATIONAL BANK, *Petitioner*,

vs.

W. F. LEIMERT, Receiver of CENTRAL MANUFACTURING DISTRICT BANK, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR PETITIONER.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR PETITIONER.

To the Honorable Charles Evans Hughes, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

I.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 72 Fed. (2d) 480, and appears in the printed record, pages 35-38. No written opin-

ion was rendered by the District Court, but its findings of fact, conclusions of law, and order for judgment, appear in the record pages 19-24.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938 (28 U. S. C. A. Sec. 347)); petition for rehearing denied September 28, 1934. (Rec. 40.) Petition for writ of certiorari was filed December 24, 1934, and writ of certiorari was granted January 21, 1935.

III.

STATEMENT OF FACTS.

The respondent, W. F. Leimert, Receiver of Central Manufacturing District Bank, of Chicago, Ill., (hereinafter referred to as the "Central Bank") filed suit in the District Court for the Northern District of Illinois, to recover from petitioner Harry E. Hallenbeck, Receiver of the South Ashland National Bank, of Chicago, Ill., (hereinafter referred to as the "Ashland Bank") the amount paid on five checks of face amounts aggregating $13,733.92 (Rec. 2-11). The case was tried before the District Judge, sitting without a jury and Special Findings of Fact and Conclusions of Law were made and filed of record by the court (Rec. 19-22).

On March 26th, 1932, James G. Hodgkinson, who was vice-president of Hodgkinson & Durfee, Inc., and also of petitioner, the Ashland Bank, drew four checks of the corporation, Hodgkinson & Durfee, Inc., aggregating $12,183.92, on the Central Bank (Rec. 19), payable to the order of the Ashland Bank, and delivered the same to the Ashland Bank, the same being thereafter carried by the Ashland bank on its books as assets (Rec. 20). On April 23rd, 1932, Hodgkin-

son drew another check of the corporation, Hodgkinson & Durfee, Inc., upon the Central Bank for $1,550., payable to the order of Hodgkinson and by him indorsed, and delivered to the Ashland Bank. On Saturday, April 23rd, 1932, four of these checks were indorsed and deposited by the Ashland Bank in the Federal Reserve Bank of Chicago for collection, (Rec. 20), and the fifth check, in the amount of $2,600. was indorsed by the Ashland Bank and forwarded to the First National Bank of Chicago for collection (Rec. 20).

Both the Central Bank and the Ashland Bank maintained accounts in the first National Bank (Rec. 21). On the next business day, Monday, April 25th, the First National Bank credited the Ashland Bank and debited the Central Bank for the amount of the check sent to it for collection. On that day, the drawer of the check, Hodgkinson & Durfee, Inc., had a balance in the Central Bank of $9.85. The check was then sent by messenger to the Central Bank and arrived there some time after noon of the same day. The Central Bank received the check and although its payment would create an overdraft in the drawer's account, did not return it to the First National Bank that day or in fact any time thereafter, and never made a claim against the First National Bank for a cancellation of the debit to its account (Rec. 21).

On the same day, Monday, the four checks indorsed and deposited with the Federal Reserve Bank for collection were presented by it to the Central Bank for payment, through the Chicago Clearing House Association (Rec. 20). The Federal Reserve Bank was a member, and the Central Bank an affiliated member, of the Clearing House. The Ashland Bank was neither a member nor an affiliated member (Rec. 20). A rule of the Clearing House in force at that time provided that in order that member banks presenting checks for payment through the Clearing House might have an opportunity to give special instructions as

to the protest of unpaid items, notice of non-payment of any such items drawn on affiliated member banks must be given by telephone before 2:30 p.m. of the same day *to the member bank presenting such items through the Clearing House.* (Rec. 21).

In accordance with the rules of the Clearing House, the Central Bank, by its check, paid the amount of these checks at the Clearing House (Rec. 20). These checks were then delivered by messenger of the Clearing House before 11:30 o'clock A. M. of the same day, to the Central Bank (Rec. 20). The Central Bank did not notify the Clearing House or the Federal Reserve Bank of the insufficiency of the drawer's funds or return the checks to the Clearing House or the Federal Reserve Bank by 2:30 P. M. of that day, or, as a matter of fact, at any time thereafter (Rec. 21). It was some time after noon, and several hours after its Clearing House balance had been settled before anyone in the Central bank learned that the payment of these four checks would create an overdraft in the account of drawer, Hodgkinson & Durfee, Inc. (Rec. 20).

When the Central Bank learned of the overdraft "that had been caused in the account of Hodgkinson & Durfee if these five checks were paid" it notified Hodgkinson. On the next morning, Tuesday, the Central Bank presented all five checks to the Ashland Bank and demanded reimbursement, which was refused. The Ashland Bank received the proceeds of all five checks (Rec. 21).

On the Findings of Fact substantially represented by the foregoing, the District Court concluded as a matter of law, inter alia:

1. That the five checks were not paid by the Central Bank;

2. That the notice given by the Central Bank to the Ashland Bank the day ~~after~~ presentment for payment "was in compliance with Section 102 of the Negotiable Instruments Law and fixed the liability of the South Ashland National

Bank to reimburse the Central Manufacturing District Bank for the amount of the checks" (Rec. 22).

Judgment was entered for the Central Bank against the Ashland Bank for $14,864.56 (Rec. 24).

On appeal to the Circuit Court of Appeals for the Seventh Circuit, judgment was affirmed (Rec. 35-38).

Rehearing was denied (Rec. 40).

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in concluding as a matter of law on the special findings of fact that the checks were not paid.

2. The Circuit Court of Appeals erred in concluding that the notice given by the Central Bank ~~to the Ashland Bank~~ on Monday, April 25, 1932, was in compliance with Section 102 of Negotiable Instruments Law, and fixed the liability of the Ashland Bank to reimburse the Central Bank for the amount of the checks.

3. The Circuit Court of Appeals erred in concluding that judgment should be entered in favor of the Central Bank against the Ashland Bank in the sum of $14,864.56, and costs, or in any sum whatsoever.

4. Having found as a matter of law that the checks were not paid, the Circuit Court of Appeals erred in holding that the Ashland Bank was liable to reimburse the Central Bank for the amount of the checks.

V.

ARGUMENT.

Summary of Argument.

Point A. The Dishonor Provisions of the Negotiable Instruments Law Have No Application To and Can Neither Create Nor Fix Any Rights in the Drawee of a Check as Against an Indorser.

Point B. The Checks Presented for Payment Through the Clearing House by the Federal Reserve Bank of Chicago Were Paid by the Central Bank, the Drawee of the Checks.

Point C. The Payment of a Check by a Bank Upon Which it is Drawn, Even Under the Mistaken Belief that the Drawer has Sufficient Funds to His Credit to Pay the Check, Cannot be Recovered from the Payee by the Bank Paying the Check.

Point D. The Exchange of Credits on the Books of the First National Bank and the Failure of the Central Bank to Repudiate Payment by that Method Resulted in Payment of the Check.

Point E. The Circuit Court of Appeals Having Found that the Five Checks Were Not Paid by the Central Bank, it Necessarily Follows that the Ashland Bank Cannot be Charged with Receiving Funds Belonging to the Central Bank and the Case Should Have Been Dismissed.

POINT "A."

The dishonor provisions of the negotiable instruments law have no application to and can neither create nor fix any rights in the drawee of a check as against the payee or indorser.

Section 102 of the Negotiable Instruments Law (Par. 124 of Article VIII (entitled: "Notice of Dishonor") Ch. 98, Cahill's Illinois Revised Stat. 1933), the section of the statute relied on by both the District Court and the Circuit Court of Appeals as fixing the liability of the Ashland Bank to reimburse the Central Bank, reads as follows:

> "Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:
>
> 1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following."

It will be observed that the Central Bank was the drawee of all five checks and that they were presented to it for payment. (Rec. 19-20.) The District Court having concluded that what was done by the Central Bank after presentation to it of the checks for payment, did not result in payment, concluded that it could recover from the Ashland Bank, an indorser, upon giving notice of dishonor within the time provided by the above section of the Negotiable Instruments Law. A brief examination of the fundamental principles of negotiable instrument law, as well as the specific provisions of the Uniform Negotiable Instruments Law, will at once demonstrate that this conclusion could result only from a fundamental misconception of the theory and purpose of notice of dishonor in connection with negotiable instruments.

Notice of dishonor is merely a step in the procedure whereby the *holder* of a check (or other negotiable instru-

ment) enforces the secondary liability assumed by an indorser by his indorsement to reimburse the holder *where the drawee has refused to honor and pay the instrument.* This secondary liability of an indorser is defined by Section 66 of the Negotiable Instruments Law (Par. 86, Ch. 98, Cahill's Illinois Revised Sta. 1933) as follows:

> "Every indorser engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken he will pay the amount thereof to the *holder or to any subsequent indorser* who may be compelled to pay it." (Italics inserted.)

Section 84 of the Negotiable Instruments Law (Par. 106, Ch. 98, Cahill's Illinois Revised Sta. 1933) provides:

> "Subject to the provisions of this Act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder."

Section 88 of the Negotiable Instruments Law (Par. 110, Ch. 98, Cahill's Illinois Revised Sta. 1933) provides:

> "Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged."

Said Section 88, and also Section 102, which was the one relied on by both courts in this case, fix the procedure and time within which this notice of dishonor by non-payment of the instrument must be given to prevent the discharge of the secondary liability of indorsers fixed by Section 66. Consequently, unless this secondary liability of indorsers runs in favor of the *drawee,* notice of dishonor can have nothing to do with any right a drawee might have to recover

payment made on a check. By the specific terms of the statute this secondary liability of indorsers runs only to "holders", and under section 88 notice is to be given to the "drawer and to each endorser", no provision being made for notice to the *drawee. The law is well settled that the presentment of a check to the drawee for payment is not a negotiation and the drawee does not become a holder.*

Figuers v. Fly, 137 Tenn. 358; 193 S. W. 117;
National Bank of Commerce v. Seattle National Bank, 109 Wash. 312; 187 Pac. 342, 345, 346;
First National Bank v. Brule National Bank, 41 South Dakota 87; 168 N. W. 1054, 1055;
Brannan's Negotiable Instruments Law, 5th Ed. 748;
Louisa National Bank v. Kentucky National Bank, 239 Kentucky 302; 39 S. W. (2nd) 497, 500, 501;
American Hominy Co. v. Milliken National Bank, 273 Fed. 550, 555, 556.

"'Holder' refers to one who has taken the instrument as it passes along in the course of negotiation towards the drawee and not the latter." *National Bank of Commerce v. Seattle National Bank,* 109 Wash. 312, at 322; 187 Pac. 342, at 346.

Also see:

National Bank of Rolla vs. First Natl. Bank of Salem (Mo.), 125 S. W. 513, 514, 141 Mo. Apps. 719;
First Natl. Bank vs. United States Natl. Bank, 197 Pac. 547, 551, 552, 553, 555; 100 Or. 264;
First Natl. Bank vs. Bank of Cottage Grove, 117 Pac. 293, 295, 296; 59 Or. 388;
South Boston Trust Co. vs. Leven, 143 N. E. 816, 817; 249 Mass. 45;
Wells Fargo Bank & Union Tr. Co. vs. Bank of Italy, et al., 4 Pac. (2) 781, 784, 785, 214 Cal. 156.

A check is an order by the drawer-depositor on the drawee bank to pay the amount thereof to the holder. The

drawee bank is not liable to the *holder* "unless and until it accepts or certifies the check." Section 188 of the Negotiable Instruments Law (Par. 210, Ch. 98, Cahill's Illinois Revised Sta. 1933). (Appendix, pg. 26.)

If the drawee decides to pay the check upon presentment for payment, the check is extinguished. If the drawee decides not to pay it, indorsers are liable under Section 66 to the holder who presented it to the drawee for payment and was refused payment provided the holder gives the necessary notice of dishonor required by the sections of the statute above quoted.

Apart from any consideration of whether the drawee might become a holder under *any* circumstances, it would seem to be a manifest absurdity to say that the obligation assumed by an indorser to reimburse subsequent holders if the *drawee refuses to pay* the check upon presentment, is an engagement by the indorser with the drawee himself, who is the very party on whom the check is an order to pay; and yet this is a necessary result of the decision in this case.

Petitioner respectfully submits that whatever rights a drawee may have to recover a payment made on a check, *are independent of and unaffected by the dishonor provisions of the Negotiable Instruments Law.* If a payment is conditional, or made under a mistake of fact, or through fraud, it might have a right of recovery from the payee under general principles of law, but obviously this right could not in any way be fixed or created by notice of dishonor under Sections 102 and 88 of the Negotiable Instruments Law. *On this ground, alone, petitioner submits the decision in this case should be reversed.*

POINT "B."

The checks presented for payment through the Clearing House by the Federal Reserve Bank of Chicago were paid by the Central Bank, the drawee of the checks.

On the basis of the special findings of fact the District Court concluded as a matter of law that the checks presented for payment through the clearing house by the Federal Reserve Bank were not paid by the Central Bank, the drawee. (Rec. 22.) Petitioner challenges this conclusion of law on the undisputed facts.

If the checks were paid, obviously the Central Bank would have to show fraud, or some mutual mistake of fact, in order to afford it a basis of recovery under general principles of law. It is not contended that the declaration pleaded any such case or that there was any attempt to show a right of recovery on any such ground.

We shall consider first the four checks that were presented for payment through the clearing house. The check that was collected through the First National Bank will be taken up later.

The principal purpose of clearing house associations is the facilitation of payment of checks drawn on various banks in large centers by dispensing with the handling and counting of cash in every instance. In general, clearing house payments take the following form: Each of the member banks sends to the clearing house on each day the checks held by it drawn on other member banks made up in packages, each package containing only the checks drawn on a single bank and marked with the total amount thereof. The sums so indicated are accepted in the clearing house settlement and each bank whose indebtedness for checks drawn on it exceeds its credits pays the balance. The checks are then sent to the banks on which drawn and they have until a stated time to verify the amount, the genuineness of the checks, or whether drawn against insufficient funds, etc., and

if found incorrect or payment refused for any reason, to notify the presenting bank, in which event the presenting bank must refund the drawee bank the amount of any such checks.

Record 20-21;
3 Ruling Case Law, 651-652;
12 American Law Reports, Annotated, 998;
Preston v. Canadian Bank of Commerce, (C. C. A. 7) 23 Fed. 179, 181, 182;
Watson's Clearing House Law, 1902, 4-5.

The law is well settled that the payment or settlement of the clearing house balance, which is required before the various drawee banks have an opportunity to examine the individual items, is only a provisional or conditional payment and any check may be returned to the collecting bank *within the time limit fixed by the clearing house rules.* Until that time limit expires payment has not been accomplished and neither a member bank nor a non-member bank can claim that the settlement of the clearing house balance constituted a final payment.

Columbia-Knickerbocker Trust Co. v. Miller, 215 N. Y. 191; 109 N. E. 179, 180;
Schneider v. Bank of Italy, 184 Cal. 595; 194 P. 1021, 1022;
German National Bank v. Farmers' Deposit Bank, 118 Pa. 294; 12 Atl. 303, 305, 306;
Merchants' National Bank v. National Eagle Bank, 101 Mass. 281;
Preston v. Canadian Bank of Commerce (C. C. A. 7) 23 Fed. 179, 181, 182.

However, if the drawee bank retains any check *and does not notify the presenting bank before the expiration of the time limit* fixed by the clearing house rules that it desires to revoke the provisional payment, it becomes final and constitutes payment in the same manner as if cash were paid over the counter, and any right of recovery depends upon

the general principles of law governing the recovery of voluntary payments.

3 Ruling Case Law, 653;
German National Bank v. Farmers' Deposit Bank, 118 Pa. 294; 12 Atl. 303, 305, 306;
National Bank of North America v. Bangs, 106 Mass. 441, 443, 444, 445;
Boylston National Bank v. Henry L. Richardson, et al., 101 Mass. 287, 290, 291;
Merchants' National Bank v. National Eagle Bank, 101 Mass. 281, 286;
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In Re Smith, Lockhart & Co., 3 F. (2) 444, 447;
Geibe v. Chicago-Lake State Bank, 199 N. W. 514, 516; 160 Minn. 89;
Pierson vs. Interborough Rapid Transit Co., 168 N. Y. Supp. 422, 425;
Eastman Kodak Co. vs. Natl. Park Bank, 231 Fed. 320, 324;
Campbell vs. Love, 150 So. Rep. 780, 782;
Atlas Nat. Bank vs. Natl. Exchange Bank, 57 N. E. 605, 609, 176 Mass. 300;
South Carolina Natl. Bank vs. McCandless, 44 F. (2) 111, 113, 114;
Hentz vs. Natl. City Bank, 144 N. Y. Supp. 979, 981.

In the case of *Merchants' National Bank v. National Eagle Bank*, 101 Mass. 281, a case where a check was not returned within the time limit fixed by the rules of the clearing house, the court said at page 286:

> "And if by any mistake of fact return of the check is not so made, then, as between the two banks it is to be treated as a payment made under a mistake of fact, precisely to the same extent, and with the same right to reclaim, which would have existed if the payment had been made by the simple act of passing money across the counter directly to the payee on the presentation of the check."

In the case of *National Exchange Bank v. Ginn & Co.*, 114 Md. 181; 78 Atl. 1026, 1027, the drawee bank failed to return the check within the allowed time. Suit was brought by the drawee against the payee, who was not a member of the clearing house but who had deposited the check in a collecting bank, a member of the clearing house. The court said, at page 184:

> "So far as the purposes of this case are concerned, the situation is precisely the same as if the appellees had in person presented the check to the appellant and had received the money over its counter."

In the various cases that have arisen where the drawee has failed to return the check within the time limited by the clearing house rules recovery has been sustained or denied depending upon the existence of facts which would authorize or deny recovery of a voluntary payment under general principles of law.

In *Merchants' National Bank v. National Eagle Bank*, 101 Mass. 281, recovery was allowed against the collecting bank because of a mutual mistake of fact.

In the next case in the same volume of the Massachusetts Reports, *Boylston National Bank v. Henry L. Richardson, et al*, 101 Mass. 287, where the action was against a depositor in the collecting bank, recovery was denied, the mistake in that case being as to the condition of the drawer's account.

In *National Exchange Bank v. Ginn & Co.*, 114 Md. 181; 78 Atl. 1026, the action was also against a depositor in the collecting bank. Recovery was denied, the mistake claimed in that case being lack of knowledge that a receiver had been appointed for the drawee.

It will be found upon examination of all of these cases that the settlement of the clearing house balance and a failure to return within the time limit, was treated as though it were a payment of cash over the counter; and recovery

was denied or allowed depending upon the general principles of law governing the recovery of voluntary payments.

The Circuit Court of Appeals for the Seventh Circuit, in the case of *Preston v. Canadian Bank of Commerce,* 23 Fed. 179, went even further and held that where the action *was between the drawee and the collecting bank* the payment could not be recovered, even where there was a mistake, because the clearing house rules amounted to a contract limiting the time within which a mistake could be corrected. However, whether the clearing house rules are interpreted as a contract which does not allow mistakes to be remedied after a certain time, or merely as fixing the time of the payment, *it is clear that a failure to return within the prescribed time results in payment.*

In the present case, recovery was allowed, not because of any mistake or fraud in making the payment, but on the ground that the checks were not paid.

It seems to be conceded by respondent and by the Circuit Court of Appeals (see opinion Rec. 38) that if the Central Bank had sued the collecting bank the payment would have been considered final. The court said, however, that the Ashland Bank, not being a member of the clearing house, could take no advantage of the clearing house rules, and denied that the provisional payment resulting from a settlement of the clearing house balance became final when the Central Bank failed to return the check to the Federal Reserve Bank by 2:30 o'clock, the time allowed under the Chicago Clearing House rules. (Rec. 38) It then said (Rec. 37) that the payment would not become final until the time for giving notice of dishonor under the Negotiable Instruments Law had expired. As shown in Point A of this brief, the time for giving notice of dishonor under the Negotiable Instruments Law has nothing whatsoever to do with the right of a *drawee* to recover a payment made on a check, or with the liability of an indorser on a check to the drawee.

The Ashland Bank indorsed the four checks in question

and deposited them for collection with the Federal Reserve Bank. The Federal Reserve Bank was a member of the clearing house. It presented the checks for payment through the clearing house to the Central Bank, also a member of the clearing house. (Rec. 20-21) *The payment was between two members of the clearing house and made in accordance with its rules. The nature and effect of that payment can only be determined from what those two banks did. The Ashland bank presented the checks for payment through its agent, the Federal Reserve Bank, and is entitled to rely upon the legal effect of the transaction between said agent and the drawee bank. Geibe vs. Chicago-Lake State Bank,* 199 N. W. 514, 516. *In Re Smith, Lockhart & Co.* 3 F. (2) 444, 447. Also see: *Moore vs. Amer. Sav. Bank & Trust Co.,* 189 Pac. 1010, 1012.

As is said in the case of *Columbia-Knickerbocker Trust Co. v. Miller,* 142 N. Y. Supp. 440, at 442:

> "All of these acts were performed by banks which were members of the clearing house association and were bound by its rules, and these rules must be considered in determining the intent of these banks, regardless of any question of whether these rules are binding upon a mere depositor in the plaintiff bank."

In that case, the check was returned within the allowed time. An outsider claimed that the settlement of the clearing house balance resulted in payment, even though the check was returned within the allowed time, arguing that the check was returned for a reason not allowed by the clearing house rules. The court held that there was no payment, inasmuch as before the payment became final the check was returned, and it was of no concern to the defendant, a nonmember of the clearing house, whether the clearing house rules were violated.

So, in the case at bar, *if* the check had been returned before 2:30 o'clock, the provisional payment would not have

become final and in such event, petitioner's rights depending upon payment, it could not claim or take advantage of any contract embodied in the clearing house rules which might have protected the collecting bank, a member of the clearing house. The Central Bank, knowing the provisional payment would become final at 2:30 o'clock, unless it notified the collecting bank, deliberately allowed that time to pass without seeking to revoke the payment, and it cannot *now* base any rights on non-payment.

An examination of the cases hereinabove cited under this point will disclose that the expiration of the time allowed under the clearing house rules, without return of the check by the drawee bank, is treated or classified as payment, regardless of whether the suit was against the forwarding, *i. e.*, presenting, member bank, or against a non-member depositor in the forwarding, *i. e.*, presenting, bank.

It is clear from the above review of the authorities in this country that the settlement of the clearing house balance by the Central Bank and a failure to return the check or revoke the payment before 2:30 o'clock of the same day resulted in a payment of the four checks.

Furthermore it may be observed that the fact that the Central Bank filed suit to recover the alleged proceeds of said checks from the Ashland Bank, necessarily commits it to the position that it made payment of said checks to the Federal Reserve Bank through the Clearing House transaction, as to four of the checks, and to the First National Bank as to the fifth check, and that the Ashland Bank received these payments from the Federal Reserve Bank and from the First National Bank, respectively. Hence it follows, from this position of the Central Bank, that payment of the checks must be taken as an accepted or conceded fact.

To sustain recovery it is necessary for respondent to show such mistake or fraud as would under the circumstances justify recovery of a voluntary payment under general principles of law. The clearing house rules do not help

or hinder the Central Bank if recovery of a voluntary payment by a drawee may be had under general principles of law.

This court has held that the voluntary payment of a check by the drawee cannot be recovered unless there is *mutual* mistake or fraud.

> *American National Bank v. Miller*, 229 U. S. 517; 33 S. Ct. 883; 57 L. Ed. 1310.
> *National Bank v. Burkhardt*, 100 U. S. 686; 25 L. Ed. 766.

Inasmuch as the checks were paid, the decision in the case at bar is contrary to the above decisions. We will show in the next Point that there was no such mistake or fraud as would justify a recovery under general principles of law.

POINT "C."

The payment of a check by a bank upon which it is drawn, even under the mistaken belief that the drawer has sufficient funds to his credit to pay the check, cannot be recovered from the payee by the bank paying the check.

The great weight of authority in the United States is to the effect that a drawee bank which voluntarily pays a check drawn upon it, cannot recover the payment from the payee, even though the payment is made under the mistaken belief that the drawer has sufficient funds to his credit to pay the check.

Riverside v. First National Bank of Shenandoah, 74 Fed. 276, 278;
1st Nat. Bank v. Burkham, 32 Mich. 328, 330;
First National Bank of Denver v. Devenish, 15 Colo. 229; 25 Pac. 177, 178;
National Bank v. Burkhardt, 100 U. S. 686, 689; 25 L. Ed. 766;
National Bank of New Jersey v. Berrall, 70 N. J. 757; 58 Atl. 189, 190;
5 Ruling Case Law, 569-572;
American National Bank v. Miller, 229 U. S. 517, 521; 33 S. Ct. 883; 57 L. Ed. 1310;
Huffman vs. Farmers' Natl. Bank, 10 S.W. (2) 753, 755;
Hayes vs. Tootle-Lacy Natl. Bank, 72 F. (2) 429, 432;
Security Natl. Bank vs. Old Natl. Bank, 241 Fed. Rep. 1, 9, 14;
Liberty Trust Co. vs. Haggerty, 113 Atl. 596, 597; 92 N. J. 609;
Citizens Bank vs. Schwarzschild & Sulzberger Co., 64 S. E. Rep. 954, 956; 109 Va. 539;
Oddie vs. Natl. City Bank, 45 N. Y. 735, 741.

Some courts base this rule on the ground that there is no privity between the holder of a check and the drawee; others upon the ground that since the bank always has

the means of knowing the state of the depositor's account by simply looking at its books, such a payment is not a payment by mistake within the meaning of the legal rule which ordinarily permits a recovery.

Assuming for discussion that the *Central Bank* in the present case made a mistake as to the state of the drawer's account, and that the pleadings and special findings were framed under that theory, *still under the rule announced by the above cases there would be no right of recovery.* However, there was no finding by the District Court that there was any mistake of fact. The only finding is:

> "It was some time after noon, several hours after its 'Clearing House Balance' had been settled, before anyone in the Central Manufacturing District Bank learned that the payment of these four checks would create an overdraft in the account of Hodgkinson & Durfee, Inc., because on that day Hodgkinson & Durfee, Inc., had a balance in the Central Manufacturing District Bank of Nine and 85/100ths Dollars $9.85." (Rec. 20-21.)

It does not appear whether this knowledge came to the Central Bank before or after 2:30 o'clock, or that any mistake prevented the Central Bank from ascertaining the state of the drawer's account before 2:30 o'clock. Nor is there any finding that the Ashland Bank did not receive the payment in good faith, the court's decision allowing recovery without discussion of mistake or good faith. It did appear that Hodgkinson was vice-president of the drawer of the check and also of the Ashland Bank. There is no finding that Hodgkinson's knowledge, if he had knowledge of facts prejudicial to the Central bank and/or to the Ashland bank (and there is no finding that he had such knowledge), was imputed to the Ashland bank, and the law is well settled that there is a presumption that an officer of the bank will not disclose those matters of which he has knowledge which it may be to his interest to conceal.

American National Bank of Nashville, Tennessee v. Miller, 229 U. S. 517-521; 33 S. Ct. 883; 57 L. Ed. 1310.

As far as appears from the findings, the Central Bank voluntarily paid the checks and took its chance on getting payment back from the drawer.

The declaration of the respondent does not allege the payment of money under a mistake of fact or to one not receiving it in good faith and does not claim recovery on any such grounds. (Rec. 3-10.) *Nor did the court make any findings which would enable the respondent to recover on that theory.*

It is a familiar principle of law that every fact necessary to constitute a cause of action must be pleaded and proved in order to entitle plaintiff to recover. *Regina Feder v. The Midland Casualty Company,* 316 Ill. 552; 147 N. E. 468, 471. If respondent had sued on the theory of recovering a payment made by mistake or to one not receiving the payment in good faith, it would have had to allege facts in the declaration justifying a recovery on that theory, and petitioner would have had an opportunity to present evidence along that line. *The case was not tried on that theory and no facts were found by the court which would justify a recovery on that theory. Respondent is bound by its declaration and the theory upon which the case was tried.*

The cases cited under Point "B" show that the payment through the clearing house under the circumstances was the same as a payment over the counter. The cases cited in this Point show that such a payment cannot be recovered, under the circumstances at bar, even if a proper case were made by the declaration.

POINT "D."

The exchange of credits on the books of the First National Bank and the failure of the Central Bank to repudiate payment by that method resulted in payment of the check.

This court has held that the giving of an unconditional credit by the drawee bank on presentation of a check for payment results in payment in the same manner as a payment of cash over the counter.

> *National Bank v. Burkhardt,* 100 U. S. 686, 689; 25 L. Ed. 766;
> *American National Bank v. Miller,* 229 U. S. 517, 520, 521; 33 S. Ct. 883; 57 L. Ed. 1310.

The Central Bank maintained an account with the First National Bank. On the receipt of the check indorsed by the Ashland Bank, the First National Bank immediately debited the account of the Central Bank for the amount of the check and credited the Ashland Bank. The check was then sent by messenger to the Central Bank and presented for payment (Rec. 20-21). The Central Bank received the check and although its payment would create an overdraft, it never, at any time, returned the check to the First National Bank or demanded a cancellation of this debit, but sued the Ashland Bank for the amount represented by this debit, thus, ratifying this method of payment to the First National Bank. In legal effect, it is the same as though on presentation for payment the Central Bank had given the First National Bank an unconditional credit on its own books for the amount of the check. The authorities above cited show that this amounts to payment. We have shown under Point "B" of our argument that a payment by the drawee of a check cannot be recovered, even when made under the mistaken belief that the drawer had sufficient funds or would make the check good.

It may be observed that if the debit by the First National Bank to the account of the Central Bank was not accepted by the Central Bank, then the First National Bank was bound to pay the full amount to the Central Bank on demand. The fact that it might refuse to do so and the Central Bank might have to sue the First National Bank to secure its full credit, could not alter the situation. In such a case, the Central Bank would have no claim against the Ashland Bank as it had received nothing that belonged to the Central Bank. The Central Bank, however, saw fit to accept the debit entered by the First National Bank to its account, without seeking to cancel or repudiate the same to the First National Bank, thus, voluntarily making payment by that method. Whether it thought it could get this money from the drawer, or that the Ashland Bank would voluntarily reimburse it if the drawer did not, is immaterial. Having volunarily made payment, its right to recover must rest on the general principles of law governing recovery of payments, and such a case would have to be made out by the pleadings. We refer the court to our argument under Points "B" and "C" on this question.

POINT "E."

The Circuit Court of Appeals having found that the five checks were not paid by the Central Bank, it necessarily follows that the Ashland Bank cannot be charged with receiving funds belonging to the Central Bank and the case should thereupon have been dismissed.

The Trial Court, and the Court of Appeals, both held that the Clearing House transactions in the case of four checks, and the transaction with the First National Bank, in the case of one check did not constitute payment. Upon this premise, it necessarily follows that if payment was *not* made by the Central Bank to the Federal Reserve Bank and/or to the First National Bank, *no money of the Central Bank passed from the Federal Reserve Bank or from the First National Bank to the Ashland Bank* and that the remittances, if any, by the Federal Reserve Bank and by the First National Bank to the Ashland Bank, are transactions entirely between those banks and the Ashland Bank, with which the Central Bank is not concerned. The remedy of the Central Bank, if any, would be against the Federal Reserve Bank and the First National Bank, respectively, to recover its balances undiminished by the amounts of the checks in question. Consequently it was clearly error, under these circumstances, for the Court of Appeals to hold that the Ashland Bank was liable to reimburse the Central Bank for the amount of said checks.

CONCLUSION.

It is therefore respectfully submitted that this court should reverse the decision of the Circuit Court of Appeals for the Seventh Circuit.

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APPENDIX.

Paragraph 210 Chapter 98 Cahill's Illinois Revised Statutes 1933 (Sec. 188 N. I. L.):

> "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."